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No. 82-863

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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ALCEE L. HASTINGS, PETITIONER

*v.*

UNITED STATES OF AMERICA, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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REX E. LEE
*Solicitor General*

D. LOWELL JENSEN
*Assistant Attorney General*

KATHLEEN A. FELTON
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

## QUESTION PRESENTED

Whether an active federal judge must be impeached before he can be indicted and prosecuted for federal crimes involving the misuse of his judicial authority.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 681 F.2d 706. The opinion of the district court (Pet. App. 16a-19a) is not reported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. 20a-21a) was entered on July 12, 1982. A petition for rehearing was denied on September 22, 1982 (Pet. App. 22a). The petition for a writ of certiorari was filed on (Monday) November 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

On December 29, 1981, a four-count indictment (Pet. App. 23a-30a) was returned against petitioner and William A. Borders, Jr., in the United States District Court for the Southern District of Florida. The indictment charged that

petitioner, a United States District Judge in the Southern District of Florida, and Borders, an attorney from Washington, D.C., solicited and accepted a bribe from an undercover agent who was posing as a criminal defendant in a case that had been pending before petitioner. The bribe allegedly was given in return for petitioner's agreement to reduce that defendant's prison sentence and to revoke an order forfeiting certain property of that defendant. Petitioner was charged in the indictment with conspiracy to solicit and accept money in return for unlawful influence in the performance of lawful government functions, in violation of 18 U.S.C. 371 (Count I), and with corruptly obstructing the due administration of justice, in violation of 18 U.S.C. 2 and 1503 (Count II).[1]

Petitioner moved to quash the indictment on the ground that the court lacked jurisdiction over the criminal prosecution of an active federal judge who had not been removed from office by impeachment. After the trial judge denied the motion (Pet. App. 15a-19a), petitioner filed an interlocutory appeal and an application for writs of mandamus and prohibition. The court of appeals found that it did have jurisdiction to hear the interlocutory appeal and accordingly denied the application for the writs; on the merits of the appeal, the court affirmed the district court's denial of the motion to quash the indictment (Pet. App. 1a-11a).

## ARGUMENT

Petitioner contends (Pet. 7-9) that the indictment against him should have been quashed, because the Constitution vests in Congress the exclusive jurisdiction, through the

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[1]Counts III and IV were limited to charges against Borders. The two cases were severed for trial. Borders was convicted after a jury trial in the United States District Court for the Northern District of Georgia, where his case had been transferred on his motion for a change of venue (see Pet. App. 3a n.3).

impeachment process, to bring to trial and punish a sitting federal judge. He also contends (Pet. 10-27) that the principles of separation of powers and judicial independence would be violated by allowing the Executive Branch to prosecute an active federal judge for acts committed in his official capacity. Preliminarily, we note that petitioner's request for a stay of his trial pending action on the instant petition was denied by this Court, and jury selection began on January 13, 1983. Even if the issue otherwise merited review, this procedural posture renders review inappropriate at this juncture in the case. In any event, petitioner's arguments were correctly rejected by the courts below, and review by this Court is unwarranted.

1. The Constitution does not bar the criminal prosecution of an active federal judge. The tenure of federal judges is set forth in Article III, Section 1: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior." The Constitution provides for impeachment in Article II, Section 4:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Clearly, neither provision confers on a judge any immunity from prosecution. The only constitutional provision discussing any relationship at all between impeachment and the criminal process is Article I, Section 3:

> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy an Office of honor, Trust, or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

As the language of this provision makes clear, and as the court of appeals found (Pet. App. 7a-8a), the purpose of this latter clause was not to confer upon judges or other impeachable officers any immunity from prosecution prior to impeachment; rather, it was to ensure that the Double Jeopardy Clause could not be invoked as a bar to criminal proceedings should removal from office by impeachment precede a prosecution.

The only other court of appeals that has addressed the question of the constitutionality of prosecuting a federal judge has agreed that there is no constitutional bar. *United States* v. *Isaacs*, 493 F.2d 1124, 1140-1144 (7th Cir.), cert. denied, 417 U.S. 976 (1974).[2] In fact, the first Congress, many of whose members had been delegates to the Constitutional Convention, enacted a statute that appears to recognize that sitting federal judges could be prosecuted for bribery. Section 21 of the Act of Apr. 30, 1790, ch. 9, 1 Stat. 117; see *United States* v. *Isaacs*, *supra*, 493 F.2d at 1142. Thus, there is no basis for arguing that the text of the Constitution confers any immunity from prosecution on a federal judge.[3]

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[2]There have been three other instances of criminal proceedings brought against active federal judges. See Pet. App. 6a n.7. Judge Francis Winslow of the Southern District of New York was indicted in 1929 and resigned before trial. Judge John Warren Davis of the Third Circuit was indicted and stood trial twice before resigning in 1941. Neither claimed immunity from criminal prosecution on the ground that they had not been impeached. Judge Otto Kerner of the Seventh Circuit, who was indicted, tried, and convicted for crimes he committed before he became a judge, unsuccessfully raised the immunity issue on direct appeal from his conviction. *United States* v. *Isaacs*, *supra*. Although Judge Kerner was prosecuted for criminal acts that occurred before he joined the bench, the court made clear that that fact was irrelevant to its decision. See 493 F.2d at 1142. See also *United States* v. *Manton*, 107 F.2d 834 (2d Cir. 1938), cert. denied, 309 U.S. 664 (1940) (rejecting claim that judge, who had resigned, was immune from prosecution for his judicial acts).

[3]Indeed, even the limited immunity from arrest that Article I, Section 6, confers on members of Congress is not extended to judges.

There is no merit to petitioner's argument (Pet. 9) that conviction of a crime is equivalent to a finding that the judge has committed an impeachable offense and therefore that the Executive's power to prosecute involved here conflicts with Congress' exclusive power to impeach. Criminal prosecution cannot be equated with the impeachment process. A conviction does not remove a judge from office, and the Executive claims no power to remove petitioner from office. Whether a criminal conviction ultimately leads to removal by impeachment rests with the sound discretion of Congress. See A. Simpson, *A Treatise on Federal Impeachments* 52 (1916). Thus, even the most vigorous advocates of the view that impeachment is the sole constitutional method of removing a federal judge from office have agreed that judges are subject to criminal prosecution. See *Chandler* v. *Judicial Council,* 398 U.S. 74, 141-142 (1970) (Black, J., dissenting).

Moreover, this Court has flatly rejected the analogous argument that criminal prosecution of a Senator is unconstitutional because it allows the Executive and/or Judicial Branch to remove him during his constitutionally prescribed term. The Court explained in *Burton* v. *United States,* 202 U.S. 344, 369 (1906): "[T]he final judgment of conviction [does] not operate, *ipso facto,* to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment." See also *O'Shea* v. *Littleton,* 414 U.S. 488, 503 (1974); *United States* v. *Brewster,* 408 U.S. 501 (1972). In light of the power to prosecute and possibly imprison duly elected Congressmen, whose terms, unlike those of judges, are not limited by a "good behavior" proviso, it seems clear that the Constitution does not bar prosecution of a sitting federal judge.

2. Petitioner also relies (Pet. 8-9, 16-19) on the Judicial Councils Reform and Judicial Conduct and Disability Act

of 1980, 28 U.S.C. (Supp. V) 372, arguing that the Act embodies the judgment of Congress that the Executive Branch lacks the power to prosecute a sitting federal judge. But nothing in the Act itself addresses criminal prosecution of judges or suggests that criminal prosecution was intended to be proscribed. The language quoted by petitioner (Pet. 9; 28 U.S.C. (Supp. V) 372(c)(6)(B)(vii)(I)) does nothing more than reiterate that Congress retains its exclusive power of impeachment and removal from office.

Even a cursory reading of the relevant legislative history of the Act reveals that Congress understood that the power of the Executive Branch, through the Justice Department, to prosecute federal judges for violations of federal criminal laws is independent of the impeachment process. For example, the Honorable Elmo B. Hunter, United States District Judge for the Western District of Missouri, testified at hearings on the Act:

> First, I would like to turn to a consideration of the kind of conduct involved in our problem. We need not discuss criminal conduct as such. Federal and State criminal statutes apply to every Federal judge just as they apply to any other citizen.
>
> The U.S. attorneys and the State and local prosecutors have ample authority today to deal with that kind of misconduct. To those who have suggested that those prosecutors shy away from using their authority against a Federal judge, I have answered, and I say today, simply remove that prosecutor from office for failure to carry out his duty.

*Judicial Tenure and Discipline - 1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st & 2d Sess. 55 (1979-1980) (hereinafter "*Hearings*"). The House Report expressly recognized the power to prosecute:

> Indisputably, the question of the best means by which to deal with allegations of unfitness against federal judges is one that concerns all three branches of the federal government. * * * [T]he Executive Branch, through the Department of Justice, also has a role in the appointment process, investigates allegations of criminal misconduct against judicial officers and prosecutes such judicial misbehavior * * *. Because of the separation of powers principle established by the Constitution, these roles must remain separate.

H.R. Rep. No. 96-1313, 96th Cong., 2d Sess. 5 (1980).[4] The fact that the Judicial Conduct and Disability Act preserves and recognizes the Executive Branch's independent power to prosecute a sitting federal judge is made clear by Subcommittee Chairman Kastenmeier's statement during the hearings on the Act:

> I think it is a truism, no matter what we do here legislatively, that there will be residually the power of Congress to impeach members of the Federal judiciary, and there will be power in the executive branch to prosecute the Federal judiciary for criminal wrongdoing. Whatever course we choose, those powers will not really in the final analysis be affected or diminished.

*Hearings, supra,* at 177. In sum, to the extent it is relevant here at all, the Judicial Conduct and Disability Act confirms that there is no legislative or constitutional bar to petitioner's prosecution.

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[4]See also 126 Cong. Rec. H8785 (daily ed. Sept. 15, 1980) (remarks of Rep. Kastenmeier); 126 Cong. Rec. S13860 (daily ed. Sept. 30, 1980) (remarks of Sen. De Concini) ("Nothing in the legislation precludes a complainant from bringing any matter to the attention of the House of Representatives for an impeachment inquiry or to the U.S. Department of Justice for a criminal investigation").

3. Petitioner contends (Pet. 10-16, 19-24) that the power to prosecute a sitting judge creates the possibility of abuse of that power that would threaten the independence of the judiciary.[5] The court of appeals correctly rejected this argument (Pet. App. 8a-11a). The court noted that "the independence of the judiciary from external pressures is a highly valued element of our constitutional system" (*id.* at 8a), but observed that that independence is adequately protected by specific constitutional provisions and, in this particular context, also by the protection shared by all citizens from vindictive prosecution (*id.* at 8a-9a).[6] Indeed, as the court stated in *United States* v. *Isaacs, supra,* the independence of the judiciary may actually be better served when criminal charges against its members are tried in a court rather than in Congress. The impeachment process has proven historically to be "cumbersome and fraught with political overtones" (493 F.2d at 1144). In a court trial, on the other hand, "a judge is assured of the protections given to all those charged with criminal conduct. The issues are heard in a calm and reasoned manner and are subject to the rules of evidence, the presumption of innocence, and other safeguards." *Ibid.* See also *United States* v. *Brewster, supra,* 408 U.S. at 519-520.

In other contexts, this Court has made it clear that the doctrine of separation of powers does not operate to insulate one branch from the legitimate exercise of power by

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[5]Although petitioner suggests (Pet. 12-13) that the Executive Branch chose to prosecute him because his views and decisions were unfavorable to the government, the district court noted that "the record is totally devoid of any evidence whatsoever to support an allegation that the government's motivation in bringing these * * * charges was vindictive or retaliatory" (Pet. App. 18a).

[6]Of course, a prosecutor cannot indict a judge on his own, but rather must adduce evidence sufficient to persuade a grand jury to indict. See *United States* v. *Brewster, supra,* 408 U.S. at 522 n.16.

another. Thus, in *United States* v. *Nixon*, 418 U.S. 683, 707 (1974), the Court stated: "In designing the structure of our government and dividing and allocating the sovereign power among the co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." In the context of a criminal prosecution — in the particular case of a sitting legislator, not a judge — the Court emphatically rejected the claim that the power to prosecute for bribery endangered the independence of the legislative branch, which is additionally protected by a specific constitutional provision, the Speech or Debate Clause, Article I, Section 6, that does not apply to judges. The Court explained (*United States* v. *Brewster*, *supra*, 408 U.S. at 522, 524-525 (footnotes omitted)):

> [T]he Executive is not alone in possessing power potentially subject to abuse; such possibilities are inherent in a system of government that delegates to each of the three branches separate and independent powers.
>
> * * * * *
>
> We do not discount entirely the possibility that an abuse might occur, but this possibility, which we consider remote, must be balanced against the potential danger flowing from either the absence of a bribery statute applicable to Members of Congress or a holding that the statute violates the Constitution. As we noted at the outset, the purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. But financial abuses by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of

the public to honest representation. Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence.

See also *Burton* v. *United States, supra,* 202 U.S. at 367-369. By the same token, the integrity of the judicial system would be threatened far more by insulating a sitting federal judge from prosecution for conspiring to solicit bribes and obstructing justice than it is by the limited infringement on separation of powers involved in allowing the Executive to retain the power to institute such a prosecution.[7]

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

D. LOWELL JENSEN
*Assistant Attorney General*

KATHLEEN A. FELTON
*Attorney*

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[7]Petitioner also claims (Pet. 24-25) that no judge is qualified to preside over his trial because any judge would necessarily have an interest in the case. He thus argues that allowing this case to proceed conflicts with both 28 U.S.C. (& Supp. V) 455, concerning the disqualification of judges whose impartiality might be questioned, and *United States* v. *Will,* 449 U.S. 200 (1980). There is no merit in this argument, as the court of appeals held (Pet. App. 11a n.20). First, in *Will,* each Justice had a direct financial interest in the outcome that is absent here, where the interest of a judge in the outcome is quite speculative. In any event, the Court in *Will* held that, despite the Justices' interest in the outcome, the Rule of Necessity required the Court to decide the case (449 U.S. at 210-217), and the same principle would apply here.

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